Filed 6/30/09 P. v. Montes CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOAQUIN JOSE MONTES, Defendant and Appellant.	2d Crim. No. B204559 (Super. Ct. No. GA062542) (Los Angeles County)

Joaquin Jose Montes appeals his conviction by jury of one count of continuous sexual abuse of a child. (§ 288.5, subd. (a).) Appellant was acquitted of two counts of committing lewd acts upon a child. (§ 288, subd. (a).) The court sentenced appellant to 12 years in state prison.

Appellant contends that his conviction must be reversed because the court erroneously admitted two out of court statements under the fresh complaint doctrine. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant committed oral sex upon his stepdaughter, M., from the time she was eight or nine years old until she was twelve years old. The abuse was not reported to authorities until 2004, during bitter divorce proceedings. The defense

theory at trial was that M.'s mother fabricated the allegations to gain an advantage in the pending divorce. To disprove this, the prosecution presented "fresh complaint" evidence: testimony that M. and her mother had disclosed the abuse to others years earlier.

M. was 21 years old at the time of trial. She testified that from about 1993 to July 4, 1998, her stepfather regularly performed oral sex on her. He required her to submit in order to avoid punishment. On July 4, 1998, he was performing oral sex on her when her mother and uncle came home early from a fireworks show. M. hid naked under a crib. Her mother found her and asked whether appellant had touched her. For the first few days M. said, "No," but after about a week she said, "Yes." She did not tell her mother details. She was never again left alone with appellant and the abuse stopped.

M. testified that while the abuse was occurring or "really soon after" she told her best friend. Also, when she was about 15 she "might have mentioned it" to a church youth group leader, Wendy Gabelman. When M. turned 18 in 2003, she got married. She told her husband about the abuse while they were dating. Appellant and.M.'s mother separated in 2004. Afterward, a police officer came to ask M. about the abuse. She had not previously told anyone the details of what occurred.

M.'s uncle testified that on July 4, 1998, he and his sister came home early from a fireworks show and appellant tried to prevent his sister from going into the bedroom. He saw his sister remove M. from the bedroom, wrapped in a towel. He moved out the next day, after confronting appellant.

M.'s mother testified that on July 4, 1998, she found appellant in their bedroom pulling up his sweatpants. M. was hiding naked under a crib in the room. Appellant and.M. denied anything was happening. After about a week, M. told her mother that appellant had "touched her very many times."

M.'s mother told her pastor's wife about the abuse in 1998 and she told her pastor in 1999 or 2000. They told her to forgive him. In 2002 or 2003 M.'s mother and appellant met with their pastor to discuss the abuse. In 2004, after

appellant had left her for another woman, she consulted with a marriage counselor. She told the counselor, Lynne Cranston, about the abuse.

M.'s best friend testified, over defense objection, that M. told her about the abuse twice. On the first occasion, the girls were between 11 and 13 years old. She could not recall M.'s exact words. M. told her that appellant had become jealous of boys and "she said something that would insinuate that [he had sexually inappropriately touched her] and made me believe she must have said it right on the dot. Otherwise, I wouldn't have assumed." She shared with M. the fact that she too had been molested. They were in.M.'s bedroom and it was probably a Sunday afternoon after church.

The second occasion was when the girls were 16 or 17. They were in a car in the church parking lot and M. talked about the problems in her family and her "stepfather being very aggressive and not allowing her to do many things that most teenagers do." "She mentioned that she told--she fessed up to her mother about the abuse."

M.'s church youth group leader testified that in 2001 she was driving M. home and M. said she did not want to go home because she had problems with her stepfather. M. said he had molested her.

Marriage counselor Lynne Cranston testified that in an individual session in December of 2004, M.s mother said that appellant had sexually abused M. Cranston reported the disclosure.

Detective Alfonso Perez testified that he interviewed the family pastor in 2005. The pastor said that appellant recently told him he had oral sex with M. but he did not penetrate her. The pastor said that he did not report it because he did not know what appellant meant by oral sex.

A court appointed custody evaluator testified that she interviewed the family pastor in 2005 in connection with the divorce proceedings. He said that appellant "did something orally" to M., but that it was "only orally and nothing more

than that." He said he did not believe it but he also said, "Of course it happened." He admitted he had known about it for two years and had been counseling the family.

The pastor testified that appellant did not admit to having oral sex with M. In 2004, the pastor counseled appellant and his wife because she was upset about another woman. She asked, "Why you did this to my daughter?" Appellant replied, "I didn't do anything. The devil did."

DISCUSSION

The fresh complaint doctrine allows evidence that an alleged victim of sexual abuse made an out of court statement disclosing the abuse to another person shortly after the abuse occurred. It is admitted for the non-hearsay purpose of proving that the victim made a prompt complaint, to disprove recent fabrication. (*People v. Brown* (1994) 8 Cal.4th 746, 755-756.) The "freshness" of the complaint is not a prerequisite to admission. (*Id*. at 749-750.)

M.'s First Disclosure to Best Friend

Appellant contends that M.'s disclosure to her best friend when the girls were 12 or 13 was not admissible under the fresh complaint doctrine because the friend could not recall M.s actual statement. He contends this violated his right to confront witnesses, because he was unable to cross-examine the friend on the details of M.'s statement. We disagree.

The trial court allowed the statement after it heard testimony outside the presence of the jury and concluded that "[t]his witness at this late point in time, is able to recall enough on her own that the victim, the complaining witness in this case, conveyed to her that she had been sexually abused by [appellant]." She did not recall the details of M.'s statement, but under the fresh complaint doctrine only the fact of the complaint is admitted and the details are excluded. (*People v. Brown*, *supra*, 8 Cal.4th at p. 756.) "[O]nly the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule." (*Id.* at p. 760.) "[I]f the details of the victim's extrajudicial

complaint are admitted into evidence, even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge of sexual assault." (*Id.* at p. 763.)

The trial court conducted a hearing pursuant to Evidence Code section 402 and found credible the witness testimony on the foundational facts for admission of the statement. The witness was permitted to testify to the fact and circumstances of the complaint to the best of her recollection. Defense counsel fully cross-examined her on her inability to recall and other factors relevant to the jury's credibility determination.

M.'s Second Disclosure to Best Friend

Appellant contends that M.'s statement to her best friend when they were 16 or 17 was not a fresh complaint. The trial court was within its discretion to admit the statement for a limited purpose under the fresh complaint doctrine.

After conducting an evidentiary hearing on foundational facts, the trial court determined that M.'s statement in the church parking lot was a fresh complaint. We review the trial court's ruling on a hearsay objection for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) The statement was relevant to prove that M. discussed the abuse with her friend on a second occasion (well before the divorce). The court acted within its discretion when it admitted the statement as a fresh complaint. We recognize that the statement would have been inadmissible hearsay if offered to prove the truth of the matter asserted, that M. complained to her mother about the abuse. However, it was not offered for this purpose.

Admission of the statement could not, in any event, have been prejudicial. Upon stipulation of the parties, the trial court instructed the jury to consider the testimony only as proof that the statements were made and not to prove the occurrence of the events described. The fact that M. had confessed to her mother was already established by the mother's in-court testimony that her daughter confessed to her the details of the abuse. It was cumulative to the victim's testimony that she told

her mother appellant had touched her, and made fresh complaints to her friend, her mother, her boyfriend and her youth group leader.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Leslie E. Brown, Judge

Superior Court County of Los Angeles

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Timothy M. Weiner, Deputy Attorney General, for Plaintiff and Respondent.